Supreme Court, U.S.
FILED

No. 95 1259 FEB 7 1996

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GLENN E. HOLMES, d/b/a
HOLMES BI-RITE SUPERMARKET,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Glenn E. Holmes should be permanently disqualified from participation in the food stamp program, absent a showing that Holmes as owner of Holmes Bi-Rite Supermarket either had knowledge of or participated in a violation of the Food Stamp Act.

2. Whether Holmes should be permanently disqualified from participation in the food stamp program absent Food Stamp regulations designed to comply with basic principles of procedural or substantive due process.

3. Whether the provisions of the Food Stamp Act (7 U.S.C. § 2021[b][3][B] and 7 C.F.R. § 278.2[(a)]), which create an irrebuttable presumption of unfitness regardless of whether the owner participated in, knew about, or benefitted from such a violation, is violative of the Due Process Clause of the United States Constitution.

4. Whether signing the application to participate in the food stamp program waives the grocer's rights to contest constitutional violations inherent in the program.

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b), Petitioner represents that the parties to this petition are all named in the caption of this case. To the knowledge of the Petition, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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PETITION FOR WRIT OF CERTIORARI

REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit was entered on September 11, 1995 (App. 1a). The unpublished order denying rehearing and rehearing en banc was entered on November 9, 1995 (App. 20a). The October 18, 1994 decision of the United States District Court for the Middle District of Alabama was published at *Holmes v. United States*, 815 F. Supp. 429 (M.D. Ala. 1993) (App. 4a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated September 11, 1995 (App. 1a), and that Court denied rehearing and rehearing en banc on November 9, 1995 (App. 20a).

The statutory provision conferring jurisdiction upon this court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1). Rule 10 of the Supreme Court Rules provides for review of a court of appeals decision when the decision has (a) "so far departed from the accepted and usual cause of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's power of supervision," or when the court of appeals (b) "has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflict with applicable decisions of this court".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional Provisions and Statutes referenced in this Petition are set out, in full, as Appendix D starting at page 21a.

STATEMENT OF THE CASE

A. Course of the Proceedings and Dispositions in the Court Below

This action began when the Plaintiff/Appellant in this cause, Glenn E. Holmes ("Holmes"), d/b/a Holmes Bi-Rite Supermarket ("Bi-Rite"), filed his original complaint in the United States District Court for the Middle District of Alabama, Eastern Division, against the United States of America ("USA"), specifically the Food and Nutrition Service ("FNS") of the United States Department of Agriculture ("USDA"). R1-1. In that complaint, Holmes sought judicial review of a decision by the FNS upholding a charge of trafficking of food stamps, in violation of 7 U.S.C. § 2021 of the Food Stamp Act and 7 C.F.R. § 278.2. R1-1. The complaint alleged in Count One that the FNS, an agency of the federal government, acted invalidly in its investigation of alleged trafficking in food stamps by employees at Bi-Rite. R1-1-4. The complaint alleged there were questions of credibility of the investigative aide used by the FNS agent to conduct the transactions. Count Two cited due process violations by the FNS. R1-1-6. Count Three requested a stay of the administrative action halting enforcement of the USDA ruling imposing permanent disqualification of Bi-Rite from the Food Stamp program. R1-1-7.

After a preliminary hearing on Count Three on February 23, 1993, the District Court entered an order and memorandum opinion staying the administrative action. R3, R1-12. On March 3, 1993 that court held an evidentiary hearing on the merits of the case. R4. Holmes then filed an amended complaint, adding Counts Four and Five. R1-16. Count Four of the amended complaint charged that the Food Stamp Act is unconstitutional based on the application of an irrebuttable presumption of unfitness upon innocent owners, thus instituting a strict liability penalty without considering knowledge, participation, or benefit by the owner of the firm. R1-16-11. Count Five contended that this irrebuttable presumption constitutes the denial of a property interest to the innocent owner,

in violation of due process principles. R1-16-12. The parties extensively briefed the constitutional issues on the merits of the case for the District Court. R1-17, 24, 26, 27, 28 and R2-29, 31, 36, 37.

On January 3, 1994, the District Court held final oral arguments. Subsequently, the Court entered an order and supporting memorandum opinion entered on October 18, 1994. In that order, Judge De Ment found that Holmes did not meet this burden of proving that the violations alleged by the FNS did not occur. R2-38-7. The court held the Food Stamp Act does not contain a scienter requirement and that the lack of such requirement did not make the statute unconstitutional. R2-38-10. The court also found that there was no property right involved in doing business with the government, and thus Holmes did not have a cognizable procedural due process claim. R2-38-12. The District Court went on to hold that even if there had been a property right at stake, the afforded administrative and *de novo* judicial review procedures available cured any possible procedural deprivations. R2-38-13. Further, the court discussed the substantive due process issues riased by Holmes, and found that there is a rational relation between the FNS's goal of deterrence of trafficking and the imposition of extremely harsh penalties upon innocent firm owners for their employees' violations. R2-38-16. The court found that, based on the agency principles of apparent authority, the owner was strictly liable, regardless of his or her personal knowledge or gain. R2-38-15. The court also concluded that, by signing the application form to participate in the food stamp program, Holmes waived his right to contest any penalty imposed on the store by the FNS relating to an employee's trafficking or other illegality. R2-38-17. The court held by signing the form, the owner accepted responsibility for the acts of his or her personnel, even where the owner had no part in, benefit from, or knowledge of the illegal conduct. R2-38-17.

After finding against Holmes, the District Court dissolved the stay of disqualification from the program.

R2-39. On October 21, 1994 Holmes appealed to the Eleventh Circuit Court of Appeals. R2-40. At that time Holmes also applied for a stay of the administrative action permanently disqualifying Bi-Rite from participating in the food stamp program. R2-41. The Court of Appeals denied the stay on November 17, 1994. Holmes then sought a rehearing of the emergency stay of the administrative action. The Court, on January 9, 1995 denied rehearing. On September 11, 1995, the appellate court entered a *per curiam* order affirming the District Court. Finally, on November 9, 1995, the Eleventh Circuit denied Holmes' petitions for rehearing and rehearing en banc.

B. Statement of the Facts

The Plaintiff/Appellant, Glenn E. Holmes, owns and operates Holmes Bi-Rite, a grocery store located in Tuskegee, Alabama. The store was originally authorized to participate in the food stamp program by the FNS on March 9, 1990. R2-38-1. The food stamp program is administered by the FNS, an agency of the USDA. The food stamp program is authorized by the Food Stamp Act, 7 U.S.C. § 2011, *et seq.*

FNS conducted a compliance investigation of Bi-Rite from July 13, 1992, to September 11, 1992. The investigation revealed over four occasions the aide allegedly sold $450.00 in food stamps to Denise Hall, a store cashier, in return for $165.00 in cash. R2-38-2. The cashier is also alleged to have accepted food stamps for an ineligible item, a six-pack of beer. R1-8-2 (Ex. 1, pp. 1, 2). On September 30, 1992, a letter of charges was issued by Ronald L. King, officer in charge of the Montgomery field office of FNS, setting forth allegations that a cashier working at Holmes Bi-Rite Supermarket had violated the food stamp regulations. R2-38-2.

The charge letter also informed Holmes that his store could qualify for a $40,000.00 Civil Money Penalty ("CMP") in lieu of permanent disqualification. To be eligible for the CMP, the store had to meet certain qualifications including an effective policy and program in effect

to prevent violations, and that neither the store's management nor its ownership were involved in the violations. Holmes replied to the by letter dated October 2, 1992, and by oral response to the officer in charge on October 6, 1992. R1-16-2. Holmes denied any knowledge of the violations, as did the cashier alleged to have violated the regulations. Nevertheless, a notice of determination for a permanent disqualification was issued on October 14, 1992. R2-38-2; R1-16-3. Holmes, concerned opting for the money penalty would signify an admission of guilt, did not request the money penalty. R2-38-2. Instead, he denied the allegations made by the government and maintained Hall did not traffic any food coupons. On October 16, 1992, Holmes requested an administrative review of this decision pursuant to 7 C.F.R. § 279.5. R2-38-2. An administrative review hearing was held by Edward W. Davidson, Administrative Review Officer of the FNS, on December 2, 1992. R2-38-2.

Prior to receipt of the charge letter dated September 30, 1992, Holmes had no knowledge that food stamp violations were allegedly occurring at Holmes Bi-Rite Supermarket. R1-16-3. Holmes has never before been charged with food stamp violations, nor has he ever received a warning from the FNS. R1-16-3. Holmes did receive one letter from the FNS in mid-1991 as the result of a call-in complaint regarding cashiers in his store accepting food stamps for ineligible items. R1-16-3. However, at that time, Holmes met with his employees to review the regulations and proper procedures. Holmes heard nothing further from the FNS and to his knowledge, had appropriately dealt with the problem. R1-16-3, 4. Holmes has never seen any employee of his exchange food stamps for cash, nor has anyone ever reported that kind of activity to him prior to the charge letter dated September 30, 1992. R1-16-4.

Holmes instituted a training program for employees relative to the food stamp program, among others, upon his acquisition of Holmes Bi-Rite Supermarket. It is his

practice to hold quarterly meetings with the employees to review state and federal regulations and procedures, as well as store policy. New cashiers are trained thoroughly regarding the use of food stamps before being placed on a register, and are supervised closely during their initial employment. R1-16-4.

Neither Holmes nor Holmes Bi-Rite Supermarket has benefitted financially from any of the alleged transactions which are the basis of the charge letter. RI-16-4. Register tapes from the cash register on which the transactions allegedly took place reveal that the grand totals on the register for each of the four days in question balance, indicating that the store received neither profit nor loss from these alleged incidents. Holmes personally received no profit from the alleged incidents. R1-16-4, R4-11, 22.

On January 22, 1993, the administrative review officer issued determination that the evidence before him supported the charges that food stamps were exchanged for cash at Holmes Bi-Rite Supermarket, and sustained the determination of the Montgomery field office that Holmes Bi-Rite Supermarket should be permanently disqualified from participation in the food stamp program. R1-16-4. The adverse decision of the administrative review officer was received by Holmes on January 25, 1993. R1-16-5.

Holmes then filed this civil action, pursuant to 7 U.S.C. § 2023, for a *de novo* review of the agency decision in the United States District Court for the Middle District of Alabama, Eastern Division. Pursuant to § 2023 he also requested a stay of the permanent disqualification pending review by the court. On February 23, 1993, a hearing was held on the plaintiff's stay request. The court granted the stay (R1-13), finding that Holmes would be irreparably harmed and that he had a likelihood of prevailing on the merits. Furthermore, the court had serious concerns as to whether a statute which imposes strict liability on a store owner with no recourse to him or her to prove his or her innocence violates the Due Process Clause of the Fifth Amendment. R1-12-7.

On March 3, 1993, an evidentiary hearing was held. The parties briefed the constitutional issues raised by the court. Oral argument was held on January 12, 1994. On October 18, 1994 the District Court, issued its final decision. Judge De Ment found that 1) the Plaintiff had not met his burden of proving that the violation did not occur, 2) the innocent owner defense is defeated by the possibility of an innocent owner's receiving a mere $40,000 CMP instead of permanent disqualification, 3) there is no property right for procedural due process purposes, and the government's goal of deterrence satisfies rational basis scrutiny for substantive due process purposes, and 4) a waiver of rights occurs when the owner signs the food stamp program application which states that he or she will be held liable for the wrongful acts of employees. R2-38-1; R2-39-1.

On September 11, 1995, the Eleventh Circuit Court of Appeals, affirmed the District Court. The Court of Appeals held that the decision entered by said court in *TRM, Inc. v. United States,* 52 F.2d 941 (11th Cir. 1995), entered after Holmes filed his opening brief, necessarily disposed Holmes' arguments. The Eleventh Circuit denied Holmes' Petition for Rehearing and Suggestion for Rehearing En Banc on November 9, 1995.

REASONS FOR GRANTING THE PETITION

FNS failed to prove the alleged trafficking violations occurred. The investigative aide and the FNS agent failed to explain discrepancies in their sworn statements which were a result of unprofessional and fatally inaccurate investigative techniques.

The Food Stamp Act, Section 2021(b)(3)(B) fails to pass constitutional muster regarding procedural due process protections afforded by the Fifth Amendment. The Act deprives a citizen of a protected property right without affording proper procedure for doing so.

The provisions of the Act fail to afford citizens substantive due process protection. First, the Act unconstitutionally creates an irrebuttable presumption of unfitness of an owner to properly conduct business based on a violation of the Act by an employee. Second, the Act is not rationally related to the stated government purpose of deterrence, in that it punishes innocent owners equally as the guilty.

The act of signing the application form to initially enroll in the food stamp program is not a knowing and voluntary waiver of the aforementioned constitutional rights.

I. DISTRICT COURT CLEARLY ERRED PLACING THE BURDEN ON HOLMES TO DISPROVE THE ALLEGATIONS OF THE FOOD AND NUTRITION SERVICE.

Judge De Ment stated that the proof offered by Holmes "failed to show by a preponderance of the evidence that the transaction did not occur." R2-38-7. The court stated that the proof offered by Holmes was "unable to demonstrate any inaccuracies or inconsistencies in the government witnesses' testimony. . . ." R2-38-6. However, it is not the burden of the plaintiff to prove that the trafficking violations alleged by the government *did not* occur. Indeed, it is the government's burden to prove that those violations *did* occur. Due process commands that no one shall be deprived of a liberty interest unless the government has borne the burden of producing the evidence and convincing a fact finder of guilt. *Speiser v. Randall,* 357 U.S. 513 (1958). *Ghattas v. United States,* 40 F.3d 281 (8th Cir. 1994).

The government has not submitted credible evidence to prove the alleged violations of the food stamp program occurred in Bi-Rite. The charges against Holmes are based on visits to his store by FNS Investigator Billy Cooper and the investigative aide Carl Stovall. Stovall is the only witness with personal knowledge of the events that transpired inside the store.

According to Stovall, he was successful in exchanging food stamps for cash on each of the four visits to the store. The cashier with whom he supposedly dealt, Denise Hall, was present at the hearing on Holmes' application for stay, but Stovall could not positively identify her as the cashier with whom he dealt on any of the occasions.

> Q. Do you see her sitting in the courtroom today?
>
> A. Appears to be the person in the back there.
>
> . . .
>
> Q. Have you seen this lady testify?
>
> A. Yes, sir.
>
> Q. And do you know her to have given her name as Denise Hall?
>
> A. Yes.
>
> Q. And is she the lady you approached on July 13th?
>
> A. To the best of my knowledge.

R3-102-03.

The report indicates that Stovall told Cooper that he dealt with the same cashier each time; however, in his testimony at the stay hearing, Stovall testified that he was not positive the cashiers were the same.

> Q. Was this the same clerk that you had dealt with on the other two occasions?
>
> A. It appeared to be. I am not positively sure it's the same woman, but it appeared to be to me. R3-107.
>
> Q. . . . You said when asked if this was Ms. Hall seated out here, you said it appears to be. . . .
>
> A. In other words what I am trying to say, I am not trying to say that was definitely the same person, but it looked it to be to me. I want to get that clear.
>
> Q. It could have been a different person you talked to each time?
>
> A. Right. R3-112-13.

According to Stovall, his normal practice was to make a purchase or two at a store before trying to engage a cashier in prohibited food stamp activity so that he would

become familiar to store personnel. At Holmes' store, however, Stovall claims that he went in as a total stranger and, without any other purchase, was successful in selling a book of food stamps the first time. R3-116-117. Stovall also alleges that in four visits to the store, the cashier who allegedly gave him cash for the food stamps never said *one word* to him. R3-103, 105, 111. Furthermore, Stovall alleges that when he bought the beer, it was the single item he purchased. R-104, 105.

Other discrepancies in the report cast doubt upon Stovall's credibility. He reported two registers in the store when there are three. R3-121. Stovall reports that he was given the name "Ms. Hall" when he asked the bag boy about the cashier. R3-111. Possibly colleagues in some professional offices still refer to each other on a last name basis, and possibly some younger people still refer to elderly co-workers on a last name basis, but most people, when asked who someone is, would reply, "Denise Hall" or just "Denise." Finally, Stovall indicated at the evidentiary hearing held in this cause that he never read Cooper's transcription of his recollections of the transactions even though his signatures were provided under penalty of perjury. R3-118.

Cooper's handling of this investigation also leaves much to be desired. He merely sat in the parking lot during the time Stovall was in the store, and could not see him after he went inside. R-3-63, 65, 69, 71, 89. No effort was made to positively identify the cashier who supposedly participated in the alleged trafficking, a process that could have been handled simply by taking a picture of the suspected employee at the time he interviewed Stephen Holmes and showing it to Stovall. R3-75, 91, 93, 113, 115. This procedure has been employed in at least one other case. R3-78, 107. Cooper did not always ask Stovall how many registers were operating, as evidenced by the report of July 21 in which that question is left blank. R1-7 (Ex. 2, p. 4). He did not take the time to complete the report with Stovall question by question, but instead, had Stovall tell him what happened as they drove

for several minutes and then trusted his memory about what he had been told to fill in the report. R-3-92, 93, 106. He did not have Stovall read the report before it was signed. R-4-45. He apparently did not tell Stoval that he signed the reports under penalty of perjury, although he thought he did so. R4-36. Cooper "trained" Stovall regarding the specifics of the case and the law on the way to the store before he performed the first investigative operation at Bi-Rite. R3-00-1. Cooper admitted that after each of the four investigations was completed that he never once searched Stovall for excess food stamps or money. R3-84. He agreed that it was entirely possible that the investigative aide could have hidden stamps and/or money from Cooper which would have gone undetected. R3-84.

This is not the first time which Agent Cooper has been criticized for his slipshod performance. Cooper's work has been criticized for "sloppy direction" in the past in a case in the United States District Court for the Northern District of Alabama. *See Sharifi v. United States,* 754 F. Supp. 1543, 1546 (N.D. Ala. 1991). In that case, Cooper did not accompany the investigative aide to the store in question or observe the investigative aide in or near the stores on the occasions when he allegedly made illegal purchases with food stamps.

II. STATUTORY PENALTIES FOR VIOLATIONS OF THE FOOD STAMP ACT ARE UNCONSTITUTIONAL AS VIOLATIVE OF PRINCIPLES OF DUE PROCESS.

After Holmes perfected his appeal of the District Court finding to the appellate court, the Eleventh Circuit issued its opinion in *TRM, Inc. v. United States,* 52 F.3d 941 (11th Cir. 1995). In *TRM,* the Eleventh Circuit held that the statutory penalties imposed for trafficking violations of the Food Stamp Act do not violate Fifth Amendment Due Process principles.

The *TRM* court reached this conclusion based on two reasons—first, the post-decertification *de novo* proceedings

in federal court provide sufficient procedural safeguards to satisfy due process requirements; and second, the permanent disqualification of store owners who did not know of, participate in, or benefit from violations of the Food Stamp Act serves to further the congressional purpose of deterrence. *TRM, Inc.* Three other courts of appeals have also held the applicable provisions of the Food Stamp Act are constitutional based on similar reasoning. *See Ghattas v. United States,* 40 F.3d 281 (8th Cir. 1994); *Goldstein v. United States,* 9 F.3d 521 (6th Cir. 1993); *Freedman v. United States Department of Agriculture,* 926 F.2d 252 (3rd Cir. 1991).

However, each of these circuits have failed to consider the fundamental question in this case: whether a statutory provision which, in practice, causes a complete forfeiture of a small business absent any showing of culpability for the violative conduct and absent any possibility of the business owner refuting the irrebuttable presumption that he is permanently unfit for participation in the Food Stamp program, is constitutional.

Petitioner urges this Court to adopt the reasoning of *R Ranch Market Corp. v. United States,* 861 F.2d 236 (9th Cir. 1988). In *R Ranch* the Ninth Circuit held that a participation in the Food Stamp program may not be terminated without the government affirmatively proving that the predicate acts were taken for benefit of the store owner. *Id.* at 239.

A. Procedural Due Process.

The proposition that an individual possesses a right to due process in the deprivation of a property interest is long-standing. *Perry v. Sindermann,* 408 U.S. 593 (1972); *Speiser,* 357 U.S. 513; *Bd. of Regents v. Roth,* 408 U.S. 564 (1972). There is no precise definition of a property interest, but such an interest extends beyond "actual ownership of real estate, chattels, or money." *Roth,* 408 U.S. at 571-72. "To have a property interest in a benefit, a person clearly must have more than an

abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*, 408 U.S. at 577.

Holmes contends that his property interest which merits due process protection is that of the right to participate in the food stamp program. *See, Cross v. United States*, 512 F.2d 1212, 1217 (4th Cir. 1973). The lower court in the instant case rejected that argument based on the holding in *Bank of Jackson County v. Cherry*, 980 F.2d 1362 (11th Cir.), *cert. denied*, —— U.S. ——, 114 S. Ct. 73 (1993) which requires that the claimant of due process rights identify an independent source of law which creates the right to participate in the program. 980 F.2d at 1366.

Holmes contends that being licensed to participate in the food stamp program and thus in his chosen profession and the further fact that he must be allowed to continue participation unless and until he is removed for *cause* is the source of law which creates his property right. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982), the Supreme Court said:

> The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law [or federal law, as the case may be], which cannot be removed except "for cause". Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact."

(citations omitted). In *Thompson v. Bass*, 616 F.2d 1259 (1980), the Former Fifth Circuit held a state employee "whose employment may be terminated only for cause has a property interest . . . and is entitled to due process protection." 616 F.2d at 1265. If the individual can only be deprived of an interest *for cause*, a property right is created. That concept applies to all benefits that require "cause" before they can be removed by the government. Accordingly, since Holmes has a license to

participate in the food stamp program and Holmes' right to participate in the program may only be terminated *for cause*, he has a property right in continued participation.

Further, the importance of an individual's interest in pursuing a chosen profession and the entitlement to safeguards of the due process clause are well settled. "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Schware v. Bd. of Bar Examiners of New Mexico*, 353 U.S. 232, 238-239 (1957). Therefore, a person has the right to pursue a calling, and that right cannot be taken away without affording the person proper procedure. The court in *Bell v. Burson*, 402 U.S. 535, 539 (1971), held that:

> *Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood.* Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 . . . (1969); *Goldberg v. Kelly*, 397 U.S. 254 . . . (1970). This is but an application of the general proposition that the relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominaed a 'right' or a 'privilege.' 402 U.S. 535, 539 (1971).

(Emphasis added). Holmes contends the operation of the Food Stamp Act encroaches on his right to engage in his chosen profession by depriving him of the right to participate in the food stamp program without due process.

The court must look not only to the weight of the individual's interest, but must also look to see whether the nature of the interest is one contemplated by the "liberty or property" language of the Fourteenth Amendment.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The right to follow a chosen profession free from unreasonable governmental interfeernce comes within the "liberty" and "property" concepts of the Fifth Amendment. *Greene v. McElroy*, 360 U.S. 474, 492 (1959). The government cannot exclude a person from any occupation in a manner that contravenes the Due Process or Equal Protection Clauses. *Schware v. Board of Bar Examiners*, 353 U.S. at 238. Due process commands that no one shall be deprived of a liberty interest unless the government has borne the burden of producing the evidence and convincing a fact finder of guilt. *Speiser*, 357 U.S. at 526. The government has deprived Holmes of a property right, and he thus is entitled to due process protection.

Assuming arguendo that the violative conduct did occur, the Food Stamp Act's failure to consider the fault of a store owner for such a violation is contrary to due process principles. No fair opportunity exists to rebut the presumption created by the statute. *See, Vlandis v. Kline*, 412 U.S. 441 (1973).

Holmes' specific constitutional challenges to the penalty provisions for trafficking are comparable to the line of cases which deals with the appropriateness of conclusive evidentiary presumptions, such as *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); and *Stanley v. Illinois*, 405 U.S. 645 (1972). Under those holdings, Holmes maintains that the Food Stamp Act creates an irrebuttable presumption that if trafficking violations have occurred in a retail food store, the store owner, regardless of whether he is guilty or innocent, is subject to a draconian penalty of permanent disqualification or a civil money penalty.

Statutes which create permanent irrebuttable presumptions have long been disallowed as violative of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *Vlandis v. Kline*, 412 U.S. 441. Holmes contends that the Food Stamp Act

creates such an irrebuttable presumption, and that, to the extent it does so, the Act is unconstitutional. 7 U.S.C. § 2021 provides for the mandatory permanent disqualification of, or the imposition of a CMP upon, any approved retail food store on the first occasion of trafficking in food stamp coupons. This statute creates an irrebuttable presumption that a retail food store owner, regardless of personal participation in, knowledge of, or profit from the transactions, is unfit to participate in the food stamp program. The statute allows this hammer to fall even upon store owners who work diligently at compliance with food stamp regulations, who carefully train their employees, and who emphasize adherence to the law. Such an owner stands to lose his business even if the trafficking violation is the result of the unauthorized criminal behavior of an employee which is concealed from him and from which he derives no financial benefit or gain.

Although the statute provides for "review" of the charges levied by the FNS against the retail food store, the review provided does nothing to allow the owner to rebut the presumption that he should be disqualified from participation in the food stamp program or subjected to a CMP. The FNS takes the ironclad position that if even a single trafficking violation occurred in the store, permanent disqualification or the CMP irrevocably follows. No warning or notice to the conscientious owner is required to allow him an opportunity to clean his own house. Positive identification of the violating employee is not required. The solitary question asked by the FNS is: "Did a trafficking violation occur in the store in question?" "[A] statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Vlandis*, 412 U.S. at 446 (quoting *Heiner v. Donnan*, 285 U.S. 312 [1932]).

Any hearing required by the Due Process Clause must be "meaningful" and "appropriate to the nature of the case." *Bell*, 402 U.S. at 541-42 (citations omitted). The

Court in *Bell* held that Georgia could not deprive a citizen of a driver's license without a hearing to assess fault. Administrative convenience did not foreclose hearing and proof in specific cases before licenses were suspended. Similarly, in this case, the FNS can not irrebutably presume a store owner is patently unfit absent a meaningful opportunity to establish whether said owner participated in, knew of, or should have known or profited from the trafficking actions. The Due Process clause was "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley*, 405 U.S. at 656. Thus the procedure afforded for review of this government deprivation of Holmes' protected property interest is constitutionally inadequate.

B. Substantive Due Process.

The Due Process Clause of the Fifth Amendment to the United States Constitution, comprises a "general prohibition against arbitrary and unreasonable governmental action." *Thompson v. Gallagher*, 489 F.2d 443, 446 (5th Cir. 1973). The clause provides that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. Procedural due process ensures that the mechanism with which a citizen's property rights are challenged meet minimum prescribed standards. Substantive due process principles protect an individual's rights against arbitrary government action which encroaches upon a protected right by requiring that legislation must be related to a legitimate government purpose. *See, Wolff v. McDonnell*, 418 U.S. 539 (1974); *Thompson*, 498 F.2d at 447.

Holmes contends that the penalties provided by the Food Stamp Act for violations create an irrebuttable presumption which is violative of substantive due process principles, and therefore, the program is unconstitutional as it is applied to innocent owners absent the availability

of such a defense. The violation occurs on two levels. First, the Act is not rationally related to the stated government purpose of deterrence [1], in that it punishes innocent owners as though they were guilty, and thus fails to act as a deterrent but instead acts to ruin both reputations and businesses with its inordinately harsh penalties upon the innocent. Second, the Act unconstitutionally creates an irrebuttable presumption of unfitness of an innocent owner to properly conduct business based on a violation of the Act by an employee.

When considering whether a strict liability penalty offends principles of due process, the United States Supreme Court has found that "proof of intent is not necessary where 'penalties . . . are relatively small, and conviction does no grave danger to an offender's reputation." *Morissette v. United States*, 342 U.S. 246, 256 (1952). *Accord*, *United States v. Engler*, 806 F.2d 425, 432 (3rd Cir.), *cert. denied*, 481 U.S. 1019 (1987).

The stated goal of deterrence in holding the innocent *owner* strictly liable for the acts of its employees, regardless of fault, is based on the government's misguided idea that the imposition either permanent disqualificaiton from the program or a $40,000 fine will stop the *employee* from trafficking of their own accord. This fine is not imposed after some necessary warning or other device designed to alert the owner to the acts of his or her employees. And there is no provision for allowing the owner to prove that he or she had no knowledge of the incidents, did not benefit from the acts, and did not participate in or otherwise ratify those actions of his or her employees. There is only a fine or permanent disqualification for the first offense. What the government and the lower court in the instant case failed to consider is the fact that, for a store such as Bi-Rite, either of

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[1] In the Congressional history of the Food Stamp Act, the goal of deterrence is cited. "These increased penalties are designed to provide the *deterrence* for those stores which might be inclined to violate the law." S.Rep. No. 504 at 64, *reprinted in* 1982 U.S. Code Cong. & Admin. News, at 1072.

those penalties will force the store out of business. Where Congress's intent is to lessen the harshness of the disqualification penalty to innocent owners by offering the CMP, it fails. No rational basis exists for imposing strict liability where either penalty would ruin the innocent owner and send the store out of business. R3-22, 38. There is no deterrent effect in that instance, but only a ruinous effect to an innocent owner. Such an enormous fine is hardly a less harsh alternative to disqualification.

In *Engler*, the court held that certain offenses can justifiably exclude a scienter requirement, when two events occur: "[w]here the offenses prohibited and made punishable are capable of inflicting widespread injury and where the requirement of proof of the offender's guilt knowledge and wrongful intent would render enforcement impossible . . . the legislative intent to dispense with mens rea as an element of the offense has a justifiable basis." 806 F.2d at 434 (citing *United States v. Greenbaum*, 138 F.2d 437, 438 (3rd Cir. 1943), which dealt with misdemeanor charges imposed where the defendants were convicted of importing impure food into interstate commerce). It is obvious how the defendants in *Greenbaum* could meet those requirements: importing impure food could have a *devastating* effect on a large portion of the population, and proving that the defendants personally knew the food was contaminated would be a difficult task, which would ultimately not alter the potential for devastation, and would essentially nullify the effect of the statute. The same test does not apply to the instant case, however. The trafficking of food stamp coupons by an employee at one store does not equate to the importing of contaminated food by a company—the potential for harming a large number of people just does not exist with trafficking as it does with the possibility of sickening or killing those who ate the contaminated food. Further, the proof of knowledge in the *Greenbaum* case would not have altered the potential disaster, and thus it is not an important factor, whereas proving that a store owner *is* aware of trafficking would

allow for harsh penalties to be effective. However, where the store owner is an innocent party, who abided by the Act's provision and is *still* harshly penalized, there is *no deterrent value.*

The exchange of food stamps for cash or ineligible items at a small grocery hardly equates to any of the other situations where innocent parties were held strictly liability, regardless of knowledge, for illegal or unauthorized activity. Those strict liability statutes which have passed constitutional muster are mostly criminal in nature, and the penalties they impose are far less stringent. *See, United States v. Dotterweich*, 320 U.S. 277 (1943), *United States v. Balint*, 258 U.S. 250 (1922), and *United States v. Freed*, 401 U.S. 601, 609 (1971), *infra.* While it is true that courts cannot set aside legislation simply because it is harsh, they can and do set aside legislation which, in part because of its extreme harshness, fails to satisfy substantive due process requirements.

The United States Supreme Court examined another provision of the Food Stamp Act in *Liparota v. United States*, 471 U.S. 419 (1985). *Liparota* involved a criminal prosecution under the fraud provisions of the Food Stamp Act. Title 7 U.S.C. § 2024(b)(1) provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" is subject to a fine and imprisonment. The Supreme Court held that the government was required to prove not only that the accused knowingly acquired and possessed food stamps, but also that he knew that his acquisition or possession of the stamps was done in an unauthorized manner. The government argued in *Liparota* that a food stamp offense is a "public welfare" offense as defined in *Morissette* to "depend on no mental element but consist only of forbidden acts or omissions." *Liparota*, 471 U.S. at 432 quoting *Morissette*, 342 U.S. at 252-53). The Court found that the offense at issue in *Liparota* differed materially from the "public welfare offenses" previously recognized.

> In most previous instances, Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety. Thus, in *United States v. Freed*, . . . we noted that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." . . . Similarly, in *United States v. Dotterweich*, . . . the Court held that a corporate officer could violate the Food, Drug, and Cosmetic Act when his firm shipped adulterated and misbranded drugs, even "though consciousness of wrongdoing be totally wanting." *See also United States v. Balint*, ... The distinctions between these cases and the instant case are clear. *A food stamp can hardly be compared to a hand grenade, see Freed, nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs, as in Dotterweich.*

471 U.S. at 433 (emphasis added).

The Food Stamp Act, while concerned with the welfare of low income persons by providing a means by which they can increase their purchasing power for food, does so by purely economic means. The penalty provisions of the Food Stamp Act are concerned with money, not with the condition of the food actually provided to the public. The concerns which made the strict liability policy affirmed by *Freed*, *Dotterweich*, and *Balint* acceptable are simply not present in the Food Stamp Act, as the Supreme Court itself has demonstrated in *Liparota*. If the Court distinguished the strict liability statutes in *Freed*, *Dotterweich*, and *Balint* from the provisions of the Food Stamp Act imposing criminal penalties for fraud violations, then surely they must be distinguished from the provisions of the Food Stamp Act imposing civil penalties for trafficking violations.

The strict liability aspects of the penalty provisions for trafficking of the Food Stamp Act as they relate to innocent owners are violative of the principles of due process. While the legislative purposes for which this statute was

enacted are certainly proper, the provisions at issue in this case bear no reasonable relation to those purposes, and they must be said to be arbitrary or discriminatory. There is no means by which the amount of the penalty can be tailored to the severity of the offense. If there is a compensatory aspect of the penalty, it is small in comparison to the deterrence and punishment aspect. Once a violation is determined to have occurred in a store, the owner is subject to permanent disqualification from the Food Stamp program, or under certain rigid qualifications, may be eligible instead for a monetary penalty of $40,000. Under either the strict liability or irrebuttable presumption theory, these provisions are unconstitutional, and must not be allowed to stand.

The lower court used a theory of agency to hold Holmes, the innocent owner, liable and to defeat the contention that there is no rational basis for the action. Judge De Ment cited *American Soc'y of Mechanical Eng'r v. Hydrolevel Corp.*, 456 U.S. 556 (1982), for the proposition that the agent's makes fraud easier to commit, when the agent appears that she or he is acting "in the ordinary course of business." The *Hydrolevel* court allowed a substantial penalty to be exacted upon an employer since "[o]nly (an owner) can take the systematic steps to make improper conduct [of] its agents unlikely, and the possibility of civil liability will be a powerful incentive for [the owner' to take those steps." *Id.* at 572.[2] However, a key component of the doctrine of "apparent authority" exists in the "appearance" that the

[2] Judge De Ment also tried to rationalize the enormity of the penalty provisions of 7 U.S.C. § 2021 by comparing the imposition of those penalties to the imposition of large punitive damages award by a juries on an insurance company found liable for the fraudulent act of one of its agents. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), cited by the lower courts, is a case which discusses the constitutionality of large punitive damages awards against a principal in an agency context. This case does not discuss statutorily imposed strict liability penalties, thus it is not proper precedent.

agent is acting within the scope of his or her authority, and also that damages are sustained by the third party "through a reliance on the appearance of [the agent's] authority. 53 Am.Jur.2d *Master and Servant* § 429. The government agent was aware and thus did not rely on the fact that the cashier at Bi-Rite did not actually or apparently possess the authority to traffick food stamps.

Trafficking food stamps is not within the scope of employment, defined as any act which the employee has been directed to do by his or her master, or "any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act, or a natural, direct, and logical result of it." 53 Am.Jur. 2d § 472 *Master and Servant.* Given even that broad definition, the act of trafficking cannot be part of the "course of employment." Stealing is not a part of the job description of a Bi-Rite cashier, and Holmes did not know of, authorize, or benefit from any such act by a cashier. R3-34, 41, 42. As the Alabama Supreme Court stated in *Doe v. Swift,* 570 So.2d 1209 (Ala. 1990), "[t]he conduct of the employee . . . *must not be* impelled by motives that are wholly personal, or *to gratify his own feelings* or resentment, but should be in promotion of the business of his employment. 570 So.2d at 1211 (emphasis in original) (quoting *Solmica of the Gulf Coast, Inc. v. Braggs,* 285 Ala. 396, 401, 232 So.2d 638, 642 [1970]).

Statutes which create permanent irrebuttable presumptions have long been disallowed as violative of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *Vlandis,* 412 U.S. 441. 7 U.S.C. § 2021 imposes mandatory permanent disqualification or a CMP, upon any retail food store after the *first* trafficking offense. The CMP exception to the draconian penalty of mandatory permanent disqualification is provided for in § 2021(b)(3)(B), and was added to the Food Stamp Act laws in 1988 by amendment. It allows the FNS the discretion to impose a CMP in lieu of permanent disqualification if the food store can prove that it

had an effective policy and program in place to prevent violations and that neither the owners nor managers of the food store were aware of, approved, benefitted from, or were involved in the trafficking. The CMP has been heralded by the Third Circuit as Congress' amelioration of the harshness of the mandatory permanent disqualification penalty. *Freedman v. United States Department of Agriculture*, 926 F.2d 252 (3d Cir. 1991). This amelioration is a fallacy. First, the CMP still subjects an innocent owner to the irrebuttable presumption that he is unfit to handle the food stamp program. Second, the requirements for receiving a CMP (not the least of which is the amount of the penalty) are such that few owners, especially small grocers, will ever be able to take advantage of them, thus continuing to subject such innocent owners to the loss of their businesses due to the acts of others. Third, the imposition of a CMP is at the discretion of the FNS. Even if an innocent owner can raise $40,000 within thirty days of demand and meets all the criteria called for in the regulations, he might still be subject to permanent disqualification.

The FNS takes the position that violations such as trafficking are difficult to prove, and therefore, the irrebuttable presumption is necessary to curb abuses in the food stamp program. Subjecting an innocent owner to such a presumption for the convenience of the government is not allowed. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Supreme Court struck down as violative of the Due Process Clause an Illinois statute's irrebuttable presumption that all unmarried fathers were unqualified to raise their children. The Court stated as follows:

> [Illinois] insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing . . . .

Id. at 658. Essentially, the Court recognized "higher values than speed and efficiency." *Id.* at 656. "Procedure by

presumption is always cheaper and easier than individualized determination." *Id.* at 656-57. Further, the Supreme Court has made it clear that "relevant constitutional restraints limit state power to terminate an entitlement whether the entitlementt is denominaed a 'right' or a 'privilege.'" *Bell v. Burson,* 402 U.S. at 539. Whether a right or a privilege, the entitlement is valuable and must be viewed within the protection of the Fourteenth Amendment. *Morrissey v. Brewer,* 408 U.S. at 481. "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" *Id.* (quoting *Joint Anti-fascist Refugeee Committee v. McGrath,* 341 U.S. 123, 168 [1951] [Frankfurter, J., concurring]).

The United States Supreme Court has previously found other sections of the Food Stamp Act violative of due process principles because of the imposition of mandatory irrebuttable presumptions. *See United States Dept. of Agriculture v. Murry,* 413 U.S. 508 (1973); *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528 (1973). In *Murry,* the Court struck down a provision of the Food Stamp Act that automatically disqualified any household which included a member who was over 18 and had been claimed as a dependent child on the tax return of a non-member of the household in a previous year. The Court found that the provision created "an irrebuttable presumption contrary to fact." *Murry,* 413 U.S. at 512. The Court concluded as follows:

> [T]he deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives rests on an irrebuttable presumption often contrary to fact. It therefore lacks critical ingredients of due process found wanting in *Vlandis v. Kline, Stanley v. Illinois,* and *Bell v. Burson.*

413 U.S. at 514 (citations omitted).

The availability of a CMP does not negate the effect of the irrebuttable presumption imposed by the Food Stamp Act. The only difference is in the severity of the penalty. Now, in lieu of mandatory permanent disqualification, an innocent owner has the option of choosing to pay a $40,000 penalty within thirty days of demand if he meets all of the criteria listed in 7 C.F.R. § 278.6(i). He must decide to request this option within ten days or is forever precluded from consideration for this alternative. Yet the notice of charges, informing him that he must request the CMP, says nothing to inform him of the right to administrative and judicial review of the FNS' decision.[3] Even if the owner timely requests the CMP, meets the criteria upon which it can be imposed, and the government exercises its discretion to use the CMP rather than disqualify, should the owner be unable to pay the $40,000 within thirty days, he is still permanently disqualified from participation in the food stamp program. *See* 7 C.F.R. § 278.6(k).

The *Badwan v. United States,* 541 F.2d 1388 (10th Cir. 1976) Court rejected the FNS' reasoning that enforcement of the Food Stamp Act would be rendered almost impossible without the bright-line rule made possible by the irrebuttable presumption. The Court stated:

> We recognize that administration of the food stamp program is inherently difficult, that the program's worthy purpose can easily be thwarted by fraud or even a level of a much lesser degree of noncompliance, and that punitive sanctions are necessary for enforcement. However, the coin has two sides and courts should not abandon their traditional function of giving very close scrutiny to situations involving the tortious or criminal actions of employees nor too readily infer agency as a premise for imposing sanctions in such cases.

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[3] In the second letter received by the store owner, after the ten days has irrevocably passed, FNS provides information about his right to an administrative hearing and de novo review by the court.

541 F.2d at 1390 (citing Restatement [Second] of Agency § 34, comment g [1958]). *Badwan*'s reasoning comports with that of the Supreme Court in *Stanley* and *Murry* as discussed above.

In *R Ranch,* the Ninth Circuit quoted the foregoing language with approval, and also determined that the penalties of the Food Stamp Act as applied to an innocent owner failed to foster the purposes of the Act. The Court reasoned:

> Congress' express purpose in mandating increased penalties was "to provide * * * deterrence for those stores which might be inclined to violate the law." S. Rep. No. 504, 97th Cong., 2d Sess. 64, *reprinted in* 1982 U.S. Code Cong. & Admin. News 1641, 1702. However, *the goal of deterrence is not served by imposing sanctions on an employer who had no knowledge of and did not benefit from the predicate violations.* To the extent the regulation permits such liability to be imposed, it must be deemed to be arbitrary and capricious.

861 F.2d at 239 (emphasis added). The views of the Ninth and Tenth Circuits correspond with the principles of due process espoused by the United States Supreme Court in invalidating statutes which violate due process by imposing an irrebuttable presumption. Congress may not impose its harsh penalties, be they permanent disqualification or a CMP, upon an owner who is unaware of unauthorized violations committed by an employee, does not benefit therefrom, and has done everything possible to insure compliance with the food stamp regulations by employees. Holmes urges this Court to adopt the reasoning of the Ninth and Tenth Circuits and to fashion an innocent owner defense to food stamp trafficking violations.

III. HOLMES HAS NOT WAIVED HIS RIGHT TO ASSERT CONSTITITIONAL CLAIMS.

The District Court held Holmes waived his right to mount the constitutional challenge to the Food Stamp Act. As a condition to his participation in the program, Holmes signed a pre-printed application containing the following assertions:

* * * *

> 3. I accept responsibility on behalf of the firm to prevent violations of the Food Stamp Program regulations, such as, but not limited to: trading cash for food stamps, accepting food stamps from people not authorized to use them, accepting food stamps as payments on credit accounts or as payment for cash loans, or accepting food stamps as payment for ineligible items.
>
> 4. I accept responsibility on behalf of the firm for violations committed by the firm's employees, including new and part-time, paid or unpaid.
>
> 5. I know that the firm's authorization can be revoked by the U.S. Department of Agriculture for any violations of the Food Stamp Program regulations by me or by any of the people working in the store. R1-24-(Ex. 8 p. 3).

The USDA cannot directly deprive Holmes of property without due process of law. Furthermore, the government cannot indirectly "produce a result which [it] could not command directly." *See Perry v. Sindermann,* 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall,* 357 U.S. 513, 526 [1958]). The government may not require one to surrender his constitutional rights as a pre-condition to extending its favor. In *Frost v. Railroad Commission,* 271 U.S. 583, 594 (1926), the Supreme Court said:

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties imbedded in the Constitution may thus be manipulated out of existence.

This principle was restated in *Watson v. Employers Liability Assur. Corp.*, 348 U.S. 66 (1954), and reaffirmed in *Harman v. Forssenius*, 380 U.S. 528 (1965). The *Frost* decision was said to have stated a "new doctrine" in *Western & S.L.I. Co. v. Bd. of Equalization*, 451 U.S. 648, 664 (1981), a case in which the pertinent *Frost* language was quoted at length with approval.

While one's constitutional rights may be waived, the court may not do so without the application of two strict tests.

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the [constitutional] rights have been waived. Fare v. Michael C., 442 U.S. 707, 725, 61 L.Ed.2d 197, 99 S.Ct. 2560 (1979).

Moran v. Burbine, 475 U.S. 412, 421 (1986).

Neither of these standards was met in this case in a manner sufficient for the Court to find that a valid waiver has been given. First, Holmes had to apply for acceptance in order to participate in the food stamp program, and he could not do so without signing a printed form containing the material alleged to have constituted a waiver. *See R Ranch*, 861 F.2d at 237. Thus, Holmes' agreement did not amount to a waiver because it is not voluntary in the sense that it was a "coerced choice." Second, a statement that one understands that he is responsible for the acts of his employees cannot reasonably be said to advise him that he is responsible for acts of his employees taken outside the line and scope of their authority.

In *Brewer v. Williams*, 430 U.S. 387, 404 (1977) the Court said, to prove waiver

> [I]t was incumbent upon the State to prove "an intentional relinquishment of abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 464, 82 L.Ed. 1461, 58 S. Ct. 1019, 146 ALR 357. That standard has been reiterated in many cases.

The Supreme Court held in both *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), that in order to prove that an individual intended to sign away rights by contract, the two parties must be of *equal bargaining power*; where there is no bargaining power at all, and the signing of the waiver is a condition of approval (as in the case of signing the contract to participate in the food stamps program), that necessary condition of the sale invalidates the volition of the signing party. The District Court in this case simply stated that "the plaintiff was under no compulsion . . . to participate in the food stamp program. . . . The agreement is crystal clear. . . ." R2-38-17. Based on the *Fuentes* and *D.H. Overmeyer* cases, what is crystal clear is the fact that Holmes could not have participated in the program without agreeing to the government's terms, thus removing any possible argument that any waiver on his part was remotely *voluntary*.

CONCLUSION

For the foregoing reasons, Holmes respectfully requests that this Court reverse the judgment of the District Court, be permanently disqualifying him from participation in the food stamp program. Holmes further respectfully requests that this Court declare unconstitutional the penalty provisions for trafficking of the Food Stamp Act as they are applied to innocent owners, thus rendering the FNS action against him invalid.

Respectfully submitted,

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Date: February 7, 1996

APPENDICES

APPENDICES

APPENDIX A

[Filed Sep. 11, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-7025
Non-Argument Calendar

D. C. Docket No. CV-93-D-165-E

GLENN E. HOLMES d/b/a
HOLMES BI-RITE SUPERMARKET,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

(September 11, 1995)

Before TJOFLAT, Chief Judge, HATCHETT and BLACK, Circuit Judges.

PER CURIAM:

Appellant Glenn E. Holmes appeals the district court's order affirming the United States Department of Agricul-

ture, Food and Nutrition Service's (FNS) permanent disqualification of Holmes from participating in the food stamp program. On appeal, Holmes contends that the permanent disqualification violates his substantive and procedural due process rights.[1] For the reasons that follow, we affirm.

Holmes owns and operates Bi-Rite Supermarket, which was originally authorized to participate in the food stamp program by the FNS on March 9, 1990. FNS conducted a compliance investigation of Bi-Rite in 1992, during which an undercover agent traded food stamps for cash at Bi-Rite on four occasions in violation of the food stamp statute and regulations.[2] The investigation revealed that the undercover agent sold $450.00 in food stamps to Denise Hall, a store cashier, in return for $165.00 in cash.

FNS then notified Hilmes by letter that Bi-Rite was being considered for permanent disqualification from participating in the food stamp program pursuant to 7 U.S.C. § 2021(b)(3(B).[3] On October 14, 1992, FNS notified Holmes that it was permanently disqualifying Bi-Rite from participating in the food stamp program. Holmes requested and received an administrative review of the decision, but the Administrative Review Officer sustained the permanent disqualification of Bi-Rite.

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[1] Holmes also contends that the trafficking violation in question did not occur. This contention is devoid of merit and need not be addressed.

[2] A retail store may accept food coupons only in exchange for eligible food items. 7 C.F.R. § 278.2(a). The buying and selling of food coupons for cash is defined as trafficking. 7 C.F.R. § 271.2.

[3] The letter also informed Holmes that his store could qualify for a $40,000 civil money penalty pursuant to 7 U.S.C. § 2021(b)(3)(B), in lieu of permanent disqualification, if the store had an effective policy and program in effect to prevent violations and if certain other criteria were established. Holmes, however, did not request the money penalty and chose to deny the allegations, maintaining that Hall did not purchase any food coupons on the occasions in question.

Holmes then filed this civil action for a *de novo* review of the agency decision pursuant to 7 U.S.C. § 2023, and requested a stay of the permanent disqualification pending review by the district court. The district court granted the stay, reasoning that Holmes had a likelihood of prevailing on the merits because a statute that imposes strict liability on a store owner with no recourse to him to prove his innocence could violate the Due Process Clause of the Fifth Amendment. *Holmes v. United States*, 815 F. Supp. 429, 432 (M.D. Ala. 1993). On October 18, 1994, the district court entered a memorandum opinion dissolving the disqualification stay, finding that the trafficking had in fact occurred and that neither Holmes' procedural nor his substantive due process rights were violated by disqualifying him from the program.[4] *Holmes v. United States*, 868 F. Supp. 1348 (M.D. Ala. 1994).

On appeal, Holmes again asserts that as an "innocent owner" of Bi-Rite, having no knowledge of Hall's alleged trafficking, his procedural and substantive due process rights were violated when the FNS permanently disqualified him from participation in the food stamp program. After Holmes filed his opening brief, however, this Court ruled that permanent disqualification of an "innocent owner" from participation in the food stamp program based on trafficking violations committed by its employee, does not violate the owner's procedural or substantive due process rights. *TRM, Inc. v. United States*, 52 F.3d 941, 944, 947 (11th Cir. 1995). Our decision in *TRM* necessarily disposes of Holmes' arguments on appeal.[5]

AFFIRMED.

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[4] In the alternative, the district court found that Holmes had waived his rights to due process by accepting the terms and conditions that accompanied the food stamp program. As we hold that Holmes' due process rights were not violated as an initial matter, we need not reach the waiver issue raised by the parties on appeal.

[5] Holmes' attempt to distinguish *TRM* on the ground that the opinion did not address all of his theories on appeal, such as his contention that the Food Stamp Act creates an improper irrebuttable presumption of fact or guilt, is devoid of merit.

APPENDIX B

[Filed Oct. 18, 1994]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 93-D-165-E

GLENN E. HOLMES d/b/a
HOLMES BI-RITE SUPERMARKET,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OPINION

This matter is before the court on plaintiff's Complaint for judicial review of a permanent disqualification penalty issued by the United States Department of Agriculture. The Complaint was filed pursuant to 7 U.S.C. § 2023. A non-jury hearing was held on March 3, 1993. After considering all the evidence and memoranda of counsel, the court affirms the penalty.

FACTS

The plaintiff, Glenn E. Holmes, owns and operates Holmes Bi-Rite Supermarket ("Bi-Rite"), a grocery store located in Tuskegee, Alabama. The store was originally authorized to participate in the food stamp program by the Food and Nutrition Service ("FNS") on March 9, 1990.[1]

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[1] The food stamp program is administered by the Food and Nutrition Service, an agency of the United States Department of Agriculture. The food stamp program is authorized by the Food Stamp Act, 7 U.S.C. § 2011, *et seq.*

FNS conducted a compliance investigation of Bi-Rite from July 13, 1992, to September 11, 1992, wherein an undercover agent on four occasions traded food stamps for cash in violation of the food stamp statute and regulations.[2] The investigation revealed that the undercover aide sold $450.00 in food stamps to Denise Hall, a store cashier, in return for $165.00 in cash.

In a letter dated September 30, 1992, FNS notified Holmes that Bi-Rite was being considered for permanent disqualification from participating in the food stamp program because of the four trafficking violations committed by Hall. The letter informed Holmes that his store could qualify for a $40,000.00 civil money penalty in lieu of permanent disqualification if the store had an effective policy and program in effect to prevent violations, and if certain other criteria were established, i.e., that neither the store's management or ownership were involved in the violations.

Holmes did not request the money penalty. Instead, he denied the allegations made by the government maintaining that Hall did not purchase any food coupons on the occasions in question. He was concerned that opting for the money penalty would signify an admission of liability.

On October 14, 1992, FNS notified Holmes that it was permanently disqualifying Bi-Rite from participating in the food stamp program. Holmes then requested and received an administrative review of the decision. A stay of the disqualification was instituted pending administrative review. An administrative hearing was held on December 2, 1992, before Edward W. Davidson, Administrative Re-

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[2] A retail store may accept food coupons only in exchange for eligible food items. 7 C.F.R. § 278.2(a). Coupons may not be accepted in exchange for cash, except when cash is returned as change in a transaction in which coupons were accepted in payment for eligible food. *Id.* The buying and selling of food coupons for cash is defined in the regulations as tracking. 7 C.F.R. § 271.2.

view Officer. On January 22, 1993, Davidson issued his determination sustaining the permanent disqualification of Bi-Rite.

Holmes then filed this civil action for a *de novo* review of the agency decision pursuant to 7 U.S.C. § 2023. He also requested a stay of the permanent disqualification pursuant to § 2023 pending review by this court. On February 23, 1993, a hearing was held on the plaintiff's stay request. The court granted the stay finding that Holmes would be irreparably harmed and that he had a likelihood of prevailing on the merits. Furthermore, the court had serious concerns as to whether a statute which imposes strict liability on a storeowner with no recourse to him or her to prove his or her innocence violates the Due Process clause of the Fifth Amendment. *Holmes v. United States*, 815 F. Supp. 429, 432 (M.D. Ala. 1993).

On March 3, 1993, a final evidentiary hearing was held. The parties briefed the constitutional issues raised by the court, and a final oral argument was held on January 12, 1994.

CONTENTIONS OF THE PARTIES

Holmes argues that the trafficking transactions did not occur at his store as alleged by the government. In the alternative, he argues that the penalty provisions of the statute violate both procedural and substantive due process under the Fifth Amendment of the United States Constitution as applied to "innocent" owners.[3] The government, on the other hand, contends that the proscribed penalties are constitutional. The government further maintains that the violations did occur; thus, the penalty is required by law.

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[3] The term "innocent" is used to define a storeowner who was not aware of, approved, or benefitted from trafficking violations committed by employees.

STATUTORY BACKGROUND

The Food Stamp Act of 1977, as amended, 7 U.S.C. §§ 2011-2029, was enacted "to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households." Congress found that the limited purchasing power of low-income households contributed to hunger and malnutrition. Thus, Congress created the food stamp program to permit low-income households to obtain a nutritious diet through normal channels of trade by increasing the food purchasing power for all eligible households. *See* 7 U.S.C. § 2011. Under the Act, households with combined incomes below a certain threshold may apply for participation in the food stamp program. *See* 7 U.S.C. § 2014. Participating households receive an allotment of food stamp coupons to buy food at approved retail food stores. *See* 7 U.S.C. §§ 2016(b), 2018.

In order to be authorized to accept and redeem coupons, a store [4] must submit an application to the Department of Agriculture. *See* 7 U.S.C. § 2012(a). Approval of a store's application is based upon a number of factors, such as the nature and extent of the store's food business, the volume of coupon business which the store may reasonably be expected to conduct, and the store's business reputation and integrity (ibid.). Once a store obtains a certificate of approval, it may accept food stamps as payment for food. The store is prohibited, however, from exchanging food stamps for cash. 7 U.S.C. 2021(b)(3)(B); 7 C.F.R. § 278.2(a).

The Act imposes severe sanctions against stores that violate the statute or regulations. *See* 7 U.S.C. § 2021. Under the statute, "trafficking", i.e., the buying or selling

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[4] The Food Stamp Act and the implementing regulations are written in terms of "retail food store" and make no distinction as to the nature of ownership, whether corporate, partnership, individual or unincorporated association.

of food stamps for cash, is a particularly serious offense: The statute requires that a participating food store be permanently disqualified from further participation in the food stamp program unless the Secretary of Agriculture determines that the store had an effective policy and program in effect to prevent violations of the Act and implementing regulations. In such case, the Secretary has the discretion to impose a civil money penalty in lieu of disqualification. *See* 7 U.S.C. § 2021(b)(3)(B).

DISCUSSION

I. *Occurrence of the violations*

The threshold issue in this *de novo* review is whether the trafficking violations occurred as alleged by the government. The plaintiff has the burden of proof to show by a preponderance of evidence that the transactions did not occur. *Redmond v. United States,* 507 F.2d 1007, 1011-12 (5th Cir. 1975); *Goodman v. United States,* 518 F.2d 505, 507 (5th Cir. 1975).

At trial, several government witnesses testified. The FNS investigative aide testified that an employee of Bi-Rite, who worked at the cash register, purchased food coupons from him for cash on four separate occasions. He identified Denise Hall as that employee.

The FNS investigator's testimony supported the trafficking allegations. The investigator testified that before the aide entered the store he was searched for both money and food coupons. The aide was then supplied with coupons. He also testified that on each occasion the aide returned to his presence immediately after departing the store with cash in his possession. The investigator then completed a written report of the trafficking transactions. The reports were admitted into evidence, and the testimony of both witnesses was consistent with the reports.

The plaintiff was unable to demonstrate any inaccuracies or inconsistencies in the government witnesses' testi-

mony which cast doubt on their credibility. The plaintiff presented Denise Hall who testified that she had never purchased food coupons at Bi-Rite. The Court finds that her testimony, however, is not credible. Based upon the evidence and testimony presented, the court finds and concludes that the plaintiff has failed to show by a preponderance of the evidence that the transactions did not occur.

II. *Innocent Owner Defense*

FNS, relying upon 7 U.S.C. § 2021(b)(3)(B), permanently disqualified Bi-Rite from the food stamp program.[5] Holmes maintains that the statute does not authorize such a harsh penalty on innocent storeowners. This court is convinced, however, after examining the

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[5] (b) Period of disqualification

Disqualification under subsection (a) of this section shall be—

(3) permanent upon—

(B) the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern, except that the Secretary shall have the discretion to impose a civil money penalty of up to $20,000 for each violation (except that the amount of civil money penalties imposed for violations occurring during a single investigation may not exceed $40,000) in lieu of disqualification under this subparagraph, for such purchase of coupons or tracking in coupons or cards that constitutes a violation of the provisions of this chapter or the regulations issued pursuant to this chapter, if the Secretary determines that there is substantial evidence (including evidence that neither the ownership nor management of the store or food concern was aware of, approved, benefitted from, or was involved in the conduct or approval of the violation) that such store or food concern had an effective policy and program in effect to prevent violations of the chapter and the regulations; or

clear language and legislative history of § 2021(b)(3), that Congress intended the penalty to apply.

The Food Stamp Act states generally that a retail food store may be disqualified from participation if "such store" violates any provision of the Act or implementing regulations. 7 U.S.C. § 2021(a). In 1982 Congress amended the statute by specifically providing periods of penalty for trafficking.[6] Congress, in an attempt to curb the increasing frequency of reported trafficking cases, authorized the permanent disqualification penalty. S.Rep. No. 504, 97th Cong., 2d Sess. 63-64, *reprinted in* 1982 U.S. Code Cong. & Admin. News 1641, 1701-02.

FNS interpreted the statute's new permanent disqualification penalty as applying to grocery stores regardless of the owner's involvement or benefit from the trafficking activity. Thus, FNS issued a regulation which provided for the permanent disqualification of a firm if "[p]ersonnel of the firm have trafficked [in coupons]. . . ." 7 C.F.R. § 278.6(e)(1)(i).

In *R Ranch Market Corp. v. United States,* 861 F.2d 236 (9th Cir. 1988), upon which Holmes relies, the Court of Appeals for the Ninth Circuit struck down the regulation as an impermissible construction of the statute because there was no indication in the statute or its legislative history that Congress intended such a harsh penalty to apply to innocent storeowners. Soon after the *R Ranch* decision, Congress amended § 2021(b)(3) to lessen the harshness of permanent disqualification.

In the 1988 amendment, Congress authorized the Secretary of Agriculture to impose a civil money penalty in lieu of permanent disqualification provided certain criteria were met. 7 U.S.C. § 2021(b)(3)(B). *See supra* n.6.

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[6] Prior to 1982 the period of disqualification was left to agency discretion. The FNS regulations provided for a range of disqualifications from thirty days to three years.

The legislative history of the amendment is particularly enlightening. Congress was concerned with the lack of an alternative penalty available to FNS in trafficking cases where an employee acted independently and for his own personal profit. 54 Fed. Reg. 18,642-43. In discussing the reasons for the addition of the monetary penalty, it was stated in the legislative report:

> A retail food store or wholesale food concern which has an effective policy and program to prevent trafficking should not be presumptively disqualified from participation in the Food Stamp Program due to the unauthorized or expressly prohibited acts of store personnel. . . . [I]nnocent persons should not be subject to the harsh penalty of disqualification where a store or concern has undertaken and implemented an effective program and policy to prevent violations. . . . *Under current law, no discretion is provided* to the Secretary of Agriculture to evaluate a store's actions to prevent these violations. . . .

H. Rep. No. 828, 100th Cong., 2d Sess. 28 (1988) (emphasis added).

These comments demonstrate that Congress understood the statute as authorizing permanent disqualification penalties on innocent storeowners. As pointed out by the Court of Appeals for the Third Circuit in *Freedman v. United States Dep't of Agric.*, 926 F.2d 252, 261 n.13 (3d Cir. 1991), the fact that Congress recognized the harshness of the permanent disqualification penalty presupposes that it authorized its imposition in the first place. *Accord, Goldstein v. United States*, 9 F.3d 521, 524 (6th Cir. 1993). Thus, innocent owners can be subject to the permanent disqualification penalty. FNS has promulgated regulations in response to the 1988 amendment which allow owners to apply for the monetary penalty. 7 C.F.R. § 278.6(b)(2)(i). If, however, as in this case, the storeowner does not request it, or is found ineligible, FNS must impose the permanent disqualification penalty. 7 U.S.C. 2021(b)(3)(B).

III. *Due Process Claims*

In its earlier opinion, this court expressed concern that the food stamp statute and implementing regulations might not afford a store owner due process. *Holmes,* 815 F. Supp. at 432. The court is now convinced, however, that neither the statute nor the regulations run afoul of the Constitution.

The Fifth Amendment to the United States Constitution provides in part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. It is clearly established that this clause provides both procedural and substantive due process protection from actions of the federal government.

A. *Procedural Due Process*

Holmes asserts that the permanent revocation of his participation in the food stamp program violates procedural due process because he was not given an opportunity to demonstrate his innocence. The three elements that Holmes must establish to prevail on his procedural due process claim are: "(1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying that deprivation." *Bank of Jackson County v. Cherry,* 980 F.2d 1362, 1366 (11th Cir.), *cert. denied,* 114 S. Ct. 73 (1993).

1. Property Interest

The Supreme Court has made clear that weighing the significance of the interest at stake to the complainant is not the proper test in determining whether a property right exists. In *Board of Regents v. Roth,* 408 U.S. 564, 570-71 (1972), the Court recognized that courts must first look to the "nature" of the interest to determine whether it comes within due process protection. "To have a property

interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. The Court went on to state that "[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

This court previously found, relying upon *Cross v. United States,* 512 F.2d 1212, 1217 (4th Cir. 1975), that Mr. Holmes has a property interest in continued participation in the food stamp program. *Holmes,* 815 F. Supp. at 431-32. However, in light of the Eleventh Circuit's holding in *Bank of Jackson County,* the court has reconsidered its earlier ruling.

In *Bank of Jackson County,* after the bank was disqualified from participating in Farmers Home Administration lending programs, it filed suit claiming that it had been deprived of a property interest. The Court, relying upon *Roth,* noted that the Bank had failed to point to any "independent source" of law giving it the right to participate in the loan guaranty program.

> While BJC surely attaches great importance to FmHA loan guaranties, our analysis must focus not upon the weight of BJC's interest, but upon the 'nature' of that interest. [citation omitted.] Simply put, federal law does not create an entitlement to FmHA loan guaranties. Thus, the 'nature' of BJC's interest in such guaranties is 'an abstract need or desire' to obtain them. [citation omitted.] Because BJC is not entitled to FmHA loan guaranties, it has no property interest in them.

980 F.2d at 1366.

The court relied upon *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964), and *Sutton v. United States Dept. of Hous. and Urban Dev.*, 885 F.2d 471, 474 (8th Cir. 1989), *cert. denied*, 493 U.S. 1075 (1990), for the proposition that citizens do not have "right" to do business with the government and that while economic injury is sufficient to confer standing in a suspension or debarment proceeding, it does not create a property interest.

2. Process Due

Assuming Holmes has a constitutionally protected property right, it is equally clear that the government has provided Holmes adequate procedures to satisfy the constitutional test. *See* 7 C.F.R. §§ 278.6, 278.8, and pt. 279 (administrative review procedures). In addition, this court's *de novo* review allows Holmes ample opportunity to contest his store's disqualification from the program. Thus, full procedural due process protection is afforded to Holmes. *Redmond v. United States*, 507 F.2d 1007, 1012 (5th Cir. 1975); *Haskell v. United States*, 930 F.2d 816, 820 (10th Cir. 1991); *Ibrahim v. United States*, 834 F.2d 52, 54 (2nd Cir. 1987).

B. *Substantive Due Process*

Holmes argues that § 2021(b)(3) violates substantive due process. He asserts that Congress has overstepped its constitutional authority by holding innocent storeowners responsible for violations of the food stamp program committed by store employees. He claims that the permanent disqualification penalty is too harsh and does not pass contitutional muster.

The test in satisfying substantive due process where no fundamental right is involved requires the legislation to have a reasonable relation to a proper legislative purpose and be neither arbitrary nor discriminatory.[7] *Nebbia v.*

[7] This is the proper substantive due process analysis because a legislative act is involved. *McKinney v. Pate*, 20 F.3d 1550, 1557, n.9 (11th Cir. 1994).

New York, 291 U.S. 502, 537 (1934); *Silver v. Baggiano*, 804 F.2d 1211, 1218 (11th Cir. 1986). Any reasonable means of achieving a legitimate government goal will satisfy the mere rational relationship test.

The goal in establishing the food stamp program was to safeguard the health and well being of the nation's population by raising levels of nutrition among low income households. 7 U.S.C. § 2011. The program was instituted in 1964 after Congress determined that the limited food purchasing power of low income families contributed to hunger and malnutrition. *Id.*

As discussed earlier, Congress amended the penalty provisions of § 2021 by authorizing the imposition of the permanent disqualification penalty for trafficking. The widespread sale of food coupons for cash was seen as undermining the goals of the program. The purpose of the penalty was to deter and prevent trafficking activity and, thus, maintain the integrity of the food stamp program. S. Rep. No. 504 at 63, *reprinted in* 1982 U.S. Code Cong. & Administrative News. "These increased penalties are designed to provide the deterrence for these stores which might be inclined to violate the law." *Id.* at 64, *reprinted in* 1982 U.S. Code Cong. & Admin. News, at 1702.

Holmes does not dispute that deterrence is a proper legislative purpose. He maintains, however, that imposing permanent disqualifications on innocent storeowners has no reasonable relation to that purpose. He argues the goal of deterrence is not served by penalizing a storeowner who had no knowledge of the trafficking, did not benefit from the activity, and did everything possible to prevent the violations from occurring. While the result may seem harsh, the law establishes that an employer may be held accountable for the unlawful acts of his employees.

The Supreme Court has upheld the imposition of liability on a principal for the fraudulent acts of its agent,

even when the agent acted solely for his or her own benefit and without the knowledge of the principal. In *American Soc'y of Mechanical Eng'r v. Hydrolevel Corp.*, 456 U.S. 556 (1982), such liability was based on the doctrine of "apparent authority," i.e., the agent's position facilitated the consummation of the fraud and he appeared to be acting in the ordinary course of business. As to imposing a substantial penalty on an employer for the acts of its agents, "[o]nly [an owner] can take the systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for [the owner] to take those steps." *Id.* at 572.

More recently, in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), the Supreme Court held that imposing liability upon an employer, under an apparent authority theory, for an employee's fraudulent acts did not violate the employer's due process rights. The Court determined that Alabama's rule of strict liability in the insurance context rationally advanced the state's interest in minimizing fraud because an insurer is more likely to prevent an agent's fraud if given sufficient financial incentive to do so. The Court recognized imposing liability on the party who is in a position " 'to guard substantially against the evil to be prevented' " creates a strong incentive for vigilance by that party. *Id.* at 14.

The permanent disqualification penalty set out in 7 U.S.C. § 2021(b)(3) provides a powerful incentive for storeowners to prevent trafficking activity. Storeowners stand in a position of responsibility for the trafficking transactions that occur in their stores, and can substantially guard against such activity. They can assure that their employees are familiar with and adhere to the food stamp regulations. They also can take aggressive measures to promulgate policies, training, and supervision of their employees, and by doing so, prevent violations of the food stamp program.

"Imposing liability without independent fault deters [i.e., trafficking] more than a less stringent rule." *Pacific Mut.*, 499 U.S. at 14. How better to combat trafficking activity than to hold the storeowner, who is in the best position to prevent it, ultimately responsible. Congress has decided to take a hard stance against trafficking violations in the food stamp program. The permanent disqualification penalty has a reasonable relation to the congressional purpose of deterring and preventing trafficking.[8] Accordingly, substantive due process is satisfied, and the concerns previously expressed by this court in *Holmes* have been alleviated.

C. *Waiver*

Moreover, an individual may contractually waive his constitutional right to Due Process. *Miami Telecommunications, Inc. v. City of Miami*, 743 F. Supp. 1573, 1576 (S.D. Fla. 1990) (citing *Erie Telecommunications Inc. v. City of Erie*, 853 F.2d 1084, 1094 (3d Cir. 1988); and *Gonzalex v. County of Hidalgo*, 489 F.2d 1043, 1046 (5th Cir. 1973)). A waiver is the voluntary relinquishment of a known right. *Id.*

Here, the plaintiff was under no compulsion or impetus to participate in the food stamp program. However, when he did so, he accepted the terms and conditions that accompanied the program, one term being his acceptance of responsibility for the acts of his employees without

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[8] Arguably, another rationally related proper legislative purpose of the penalty provisions of § 2021(b)(3) in regard to imposing a monetary penalty is that Congress decided to place some of the financial burden of maintaining the integrity of the food stamp program upon those who profit from it. *See United States v. Coastal States Crude Gathering Co.*, 643 F.2d 1125 (5th Cir. Unit A Apr. 1981), *cert. denied*, 454 U.S. 835 (1981). Thus, in addition to subjecting storeowners to money penalties on a strict liability basis to prevent and deter trafficking, Congress also may constitutionally impose money penalties as a means of shifting the cost of maintaining the program onto storeowners.

regard to the doctrine of respondeat superior. Specifically, Holmes renewed his application for participation in the program on April 12, 1992. When he signed this application, he contractually agreed to "accept responsibility on behalf of this firm for violations committed by the firm's employees. . . ." The agreement is crystal clear that he waived any reliance on the doctrine of respondeat superior, i.e., that he did not authorize, participate in, ratify, or even benefit from a violation of the regulations.

CONCLUSION

For the above reasons, judgment is due to be entered in favor of the United States of America and against Glenn E. Holmes, d/b/a Holmes Bi-Rite, affirming the determination made by FNS to permanently disqualify Bi-Rite from participation in the food stamp program. The order staying the disqualification entered by the court in *Holmes v. United States*, 815 F. Supp. 42 (M.D. Ala. 1993), is due to be dissolved. A judgment and order will be issued in accordance with this opinion.

DONE this 18th day of October, 1994.

/s/ [Illegible]
United States District Judge

[Filed Oct. 18, 1994]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

Civil Action No. 93-D-165-E

GLENN E. HOLMES d/b/a
HOLMES BI-RITE SUPERMARKET,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT AND ORDER

In accordance with the memorandum opinion entered this date, it is CONSIDERED and ORDERED that JUDGMENT be and the same is hereby entered in favor of defendant, United States of America, and against plaintiff, Glenn E. Holmes, d/b/a Holmes Bi-Rite, and that the plaintiff take nothing by his said suit.

It is further CONSIDERED and ORDERED that the administrative stay issued by the court in *Holmes v. United States*, 815 F. Supp. 429 (M.D. Ala. 1993), be and the same is hereby DISSOLVED.

It is further CONSIDERED and ORDERED that all costs herein incurred be and the same are hereby taxed against the plaintiff for which let execution issue.

DONE this 18th day of October, 1944.

/s/ [Illegible]
United States District Judge

APPENDIX C

[Filed Nov. 9, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-7025

GLENN E. HOLMES d/b/a
HOLMES BI-RITE SUPERMARKET,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING
AND SUGGESTION(S) OF
REHEARING EN BANC

Before: TJOFLAT, Chief Judge, HATCHETT and BLACK, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
United States Circuit Judge

APPENDIX D

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; not shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United State Constitution, Amendment Fourteen, § 1.

> All persnos born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REGULATIONS

7 C.F.R. § 278.2(a)

> (a) *Use of coupons.* Coupons may be accepted by an authorized retail food store only from eligible households or the households' authorized representative, and only in exchange for eligible food. Coupons may not be accepted in exchange for cash, except when cash is returned as change in a transaction in which coupons were accepted in payment for eligible

food under paragraph (d) of this section. Coupons may not be accepted in payment of interest on loans or for any other nonfood use. An authorized retail food store may not accept coupons from another retail food store, except that homeless meal providers may redeem coupons for eligible food through authorized retail food stores.

7 C.F.R. § 278.6(b)(2)(i)

(b) *Charge letter*—(2) Charge letter for trafficking. (i) The charge letter shall advise a firm being considered for permanent disqualification based on evidence of trafficking as defined in § 271.2 that the firm must notify FNS if the firm desires FNS to consider the sanction of a civil money penalty in lieu of permanent disqualification.

7 C.F.R. 279.5 § 279.5

(a) *Addressing requests for review.* Requests for review submitted by firms shall be mailed to or filed with Director, Administrative Review Division, U.S. Department of Agriculture, Food and Consumer Service, Room 304, 3101 Park Center Drive, Alexandria, VA 22302.

(b) *Content of requests.* Requests for review shall be in writing and shall state the name and business address of the firm involved, and the name, address and position with the firm of the person who signed the request. The request shall be signed by the owner of the firm, an officer or partner of the firm, or by counsel, and need not be under oath.

(c) *Time limit for requesting review.* A request for review shall be filed with the Director, Administrative Review Division, within 10 days of the date of delivery of the notice of the action for which review is requested. For purposes of determining whether a filing date is timely:

(i) The filing date shall be the postmark date of the request, or equivalent if the written request is filed by a means other than mail.;

(2) In computing the 10 day period, the day of delivery of the notice of the action for which review is requested may not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday. In that case, the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. As used in this paragraph, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day designated as a holiday by the President or the Congress of the United States.

STATUTORY PROVISIONS

United State Code Annotated Title, 7, § 2011.

It is hereby declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households. Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation's agricultural economy, as well as result in more orderly marketing and distribution of foods. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by in-

creasing food purchasing power for all eligible households who apply for participation.

United States Code Annotated Title 7. § 2021(b)(3)(B)

Civil money penalties and disqualification of retail food stores and wholesale food concerns

(b) Period of disqualification

Disqualification under subsection (a) of this section shall be

(3) permanent upon—

(B) the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern, except that the Secretary shall have the discretion to impose a civil money penalty of up to $20,000 for each violation (except that the amount of civil money penalties imposed for violations occurring during a single investigation may not exceed $40,000) in lieu of disqualification under this subparagraph, for such purchase of coupons or trafficking in coupons or cards that constitutes a violation of the provisions of this chapter or the regulations issued pursuant to this chapter, if the Secretary determines that there is substantial evidence (including evidence that neither the ownership nor management of the store or food concern was aware of, approved, benefitted from, or was involved in the conduct or approval of the violation) that such store or food concern had an effective policy

and program in effect to prevent violations of the chapter and the regulations.

United States Code Annotated Title 7. § 2023

(a) Whenever an application of a retail food store or wholesale food concern to participate in the food stamp program is denied pursuant to § 9 of this Act, or a retail food store or wholesale food concern is disqualified or subjected to a civil money penalty under the provision of § 12 of this Act, or a retail food store or wholesale food concern forfeits a bond under § 12(d) of this Act, or all or part of any claim of a retail food store or wholesale food concern is denied under the provisions of § 13 of this Act, or a claim against a State agency is stated pursuant to the provisions of section 13 of this Act, notice of such administrative action shall be issued to the retail food store, wholesale food concern, or State agency involved. Such notice shall be delivered by certified mail or personal service. If such store, concern, or State agency is aggrieved by such action, it may, in accordance with regulations promulgated under this Act, within ten days of the date of delivery of such notice, file a written request for an opportunity to submit information in support of its position to such person or persons as the regulations may designate. If such a request is not made or if such store, concern, or State agency fails to submit information in support of its position after filing a request, the administrative determination shall be final. If such request is made by such store, concern, or State agency, as well as such other information as may be available, shall be reviewed by the person or persons designated by the Secretary, who shall, subject to the right of judicial review hereinafter provided, make a determination which shall be final and which shall take effect thirty days

after the date of the delivery or service of such final notice of determination. If the Store, concern, or State agency feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint against the United States in the United States court for the district in which it resides or is engaged in business, or, in the case of a retail food store or wholesale food concern, in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon it, requesting the court to set aside such determination. The copy of the summons and complaint required to be delivered to the official or agency whose order is being attacked shall be sent to the Secretary or such person or persons as the Secretary may designate to receive service of process. The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid, it shall enter such judgment or order as it determines is in accordance with the law and the evidence. During the pendency of such judicial review, or any appeal therefrom, the administrative action review shall be and remain in full force and effect, unless an application to the court on not less than ten days' notice, and after hearing thereon and a showing of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal.

(b) In any judicial action arising under the Act, any food stamp allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year prior to the date of the commencement of such action, or in the case of an action seeking review of a final State agency determination, not more than one year prior to the date of the

filing of a request with the State for the restoration of such allotments or, in either case, not more than one year prior to the date of the State agency is notified or otherwise discovers the possible loss to a household.

United States Code Annotated Title 7. § 2024(b)(1)

Unauthorized use, transfer, acquisition, alteration, or possession of coupons or authorization cards, or access devices; restitution by convicted individuals. (1) Subject to the provisions of paragraph (2) of this subsection, whoever knowingly, uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to this Act or the regulations issued pursuant to this Act shall, if such coupons, authorization cards, or access devices are of a value of $5,000 or more, be guilty of a felony and shall be fined not more than $250,000 or imprisoned for not more than twenty years, or both, and shall, if such coupons or authorization cards are of a value of $100 or more, but less than $5,000, or if the item used, transferred, acquired, altered, or possessed is an access device that has a value of $100 or more, but less than $5,000, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may also be fined not more than $10,000 or, if such coupons or authorization cards are of a value of less than $100, or if the item used, transferred, acquired, altered, or processed is an access device that has a value of less than $100, shall be guilty of a misdemeanor, and, upon the first conviction thereof, shall be fined not more than $1,000. In addition to such penalties, any person convicted of a felony or mis-

demeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 6(b)(1) of this Act [7 USCS § 2015(b)(1)].

United States Code Annotated Title 28. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following mehtods:

(1) By writ of certiorari granted upon the petition of any party to an civil or criminal case, before or after rendition of judgment or decree.